

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| TYRELL KNIGHT, |) | |
| |) | |
| Plaintiff, |) | 4:04cv3383 |
| |) | |
| vs. |) | MEMORANDUM AND ORDER |
| |) | |
| OFFICER MERRILL, |) | |
| |) | |
| Defendant. |) | |

This matter is before the court on the following pending motions: (1) filing no. 108, the Motion for Summary Judgment filed by the defendant, Corrections Officer David Merrill; (2) filing no. 111, the Motion to Amend Complaint filed by the plaintiff, Tyrell Knight; (3) filing no. 112, the plaintiff's Motion for Additional Summons and 285 Forms; (4) filing no. 115, the plaintiff's Motion for Extension of Time to File Opposition to Defendant's Motion for Summary Judgment; (5) filing no. 116, the plaintiff's Motion for Substitution of Defendant; and (6) filing no. 117, the plaintiff's Opposition to Defendant's Motion for Summary Judgment, supported by the plaintiff's brief and evidence index (filing nos. 118 and 119). As a preliminary matter, filing no. 115, the plaintiff's Motion for Extension of Time to File Opposition to Defendant's Motion for Summary Judgment, is granted retroactively, and the plaintiff's Opposition materials (filing nos. 117, 118 and 119) are accepted for consideration instant.

Nevertheless, the record now demonstrates that the plaintiff sued the wrong party, and that Corrections Officer David Merrill was not the person who dispensed the wrong medication to the plaintiff on the day in question. The plaintiff wishes to amend his

complaint, substitute Officer Joseph Jara, the individual plaintiff believes is the correct defendant, serve Jara with process, and substitute Jara for Merrill in the present litigation. However, Officer Jara has had no opportunity to respond to pleadings, conduct discovery, or otherwise defend himself. The Federal Rules of Civil Procedure do not permit the plaintiff simply to substitute Jara for Merrill at this stage of the proceedings and continue the litigation as if Jara had been a party all along.

On the other hand, as the parties apparently agree that Officer Merrill had nothing to do with the subject of this litigation, Officer Merrill should properly be dismissed from this case. The plaintiff may amend his complaint to add Officer Jara as a new defendant, and he may complete the forms for service of process on Jara within the deadline established by this Order. Of course, the addition of Officer Jara to this case will be subject to any defenses which Jara may raise once he has been served with process and has become a party to this litigation. At this time, as the uncontroverted evidence establishes that Officer Merrill did not administer the medication at issue to the plaintiff, this action will be dismissed, with prejudice, as against Officer Merrill.

THEREFORE, IT IS ORDERED:

1. That filing no. 108, Officer Merrill's Motion for Summary Judgment, is granted, and Corrections Officer David Merrill is dismissed from this litigation with prejudice;
2. That filing no. 111, the plaintiff's Motion to Amend Complaint, is granted in part and denied in part as follows:
 - a. Filing no. 111 is granted in that the plaintiff may add Joseph Jara as

a defendant to this action; and

b. Filing no. 111 is denied in that filing no. 111 is not a sufficient Amended Complaint; the plaintiff must further amend his complaint against defendant-Jara to include factual allegations which suffice to state a claim on which relief may be granted against that defendant;

3. That filing no. 112, the plaintiff's Motion for Additional Summons and 285 Forms, is granted; the Clerk of Court shall send the plaintiff two summons forms and two USM-285 forms which the plaintiff shall complete and return to the court for service of process by the U.S. Marshal on Officer Jara in his individual and official capacities;

4. That filing no. 115, the plaintiff's Motion for Extension of Time to File Opposition to Defendant's Motion for Summary Judgment, is granted, and the plaintiff's Opposition materials (filing nos. 117, 118 and 119) are accepted for consideration *instanter*;

5. That filing no. 116, the plaintiff's Motion for Substitution of Defendant, is denied;

6. That filing no. 117, the plaintiff's Opposition to Defendant's Motion for Summary Judgment, is denied; and

7. That the following deadlines are imposed:

a. Within thirty (30) days of the date of this Memorandum and Order, the plaintiff may file an Amended and Restated Complaint naming Officer Jara as the defendant and including factual allegations which suffice to state a claim on which

relief may be granted against that defendant;

b. Within thirty (30) days of the date of this Memorandum and Order, the plaintiff shall also return the completed summons forms and USM-285 forms to the Clerk of Court for service of process by the U.S. Marshal on Officer Jara;

c. Upon receipt of the completed forms for service of process, the Clerk of Court will sign each summons and forward it with a copy of the operative complaint to the U.S. Marshal; the Marshal shall serve each summons and complaint without payment of costs or fees; and service may be by certified mail in the discretion of the Marshal; and

d. Failure by the plaintiff to meet the above deadlines may result in dismissal of this action without further notice.

DATED this 29th day of May, 2007.

BY THE COURT:

s/Joseph F. Bataillon
JOSEPH F. BATAILLON
Chief District Judge